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IN THE

Supreme Court of the United States

October Term, 1964

No. 688

In the Matter of the Estate of LILLIAN ENG,
Deceased,

BALDO M. KRISTOVICH, Public Administrator,
Petitioner,

vs.

SHU TONG NG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

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TOPICAL INDEX

Page

Citations to Opinion Below 1

Jurisdiction 2

Questions Presented 2

Treaty and Statute Involved 3

Statement of the Case 5

A. Presentation of Federal Question in the State Court 8

Reasons for Granting the Writ 10

I. Treaty is the Supreme Law of the Land and Supersedes Conflicting Provisions of State Law 11

II. Abrogation of a Treaty is a Political Question 12

III. California District Court of Appeal Decision is in Conflict with United States Supreme Court Decisions 14

Conclusion 15

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Clark v. Allen 331 U.S. 503, 67 S. Ct. 431. 91 L. Ed. 1633 ..... 7, 11, 12, 14
Estate of Nepogodin 134 Cal. App. 2d 161 ..... 7, 12
Kolovrat v. Oregon 366 U.S. 187, 6 L. Ed. 2d 218 .. 7, 14

Authorities

California Probate Code
Section 259 ..... 3, 11
Section 422 ..... 3, 4
California State Constitution Sections 2 and 4 of Article VIII 3
United States Constitution Article VI, Clause 2 ..... 8, 11
United States Treaties in force (1963 Publication of United States Department of State) 11, 12

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Petitioner, Public Administrator of the County of Los Angeles, prays that a writ of certiorari issue to review the judgement of the California District Court of Appeal, Second Appellate District, Division Three.

CITATIONS TO OPINION BELOW

The opinion of the California District Court of Appeal, (last document on file in Certified Record) reproduced in Appendix "A" to this petition was filed on June 24, 1964, and is reported in 228 Advanced California Appellate 181.

JURISDICTION

The judgement of the District Court of Appeal of the State of California, Second Appellate District, was entered on June 24, 1964. A timely petition for hearing in the Supreme Court of California was filed and was denied on August 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256(3) since the validity of a treaty of the United States is drawn in question.

QUESTIONS PRESENTED

Is the Treaty of Friendship, Commerce and Navigation of the United States of America and the Republic of China, which gives reciprocal rights of inheritance to real and personal property to all residents and citizens of each respective country inapplicable to those captive on the mainland because of official acts of the United States Department of State?

TREATY AND STATUTE INVOLVED

The treaty involved is the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, which was signed on November 4, 1946, and entered into force November 30, 1948. (63 Stats. at large, pt. 2, p. 1300). The pertinent provisions of the treaty material to the question of reciprocal rights of inheritance are Sections 2 and 4 of Article VIII; see Appendix "B". The California Statutes involved are Section 259 of the Probate Code which governs California law as to reciprocal rights of inheritance with foreign countries and Section 422 of the Probate Code which governs priorority as to whom letters of administration shall issue.

Section 259 of the California Probate Code reads as follows:

> "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property

in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a receprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

Section 422 of the California Probate Code reads as follows:

"Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:

(1) The surviving spouse, or some competent person whom he or she may request to have appointed.
(2) The children.
(3) The grandchildren.
(4) The parents.
(5) The brothers and sisters.
(6) The next of kin entitled to share in the estate.
(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

(8) The public administrator.
(9) The creditors.
(10) Any person legally competent."

STATEMENT OF THE CASE

This case involves the question of who has a prior right to letters of administration—the petitioner public administrator, or the respondent—bother of the decedent's predeceased spouse. The decision of this question in turn depends upon whether there was, at the date of the decedent's death on December 5, 1962, reciprocity of inheritance between residents and citizens of the Republic of China and residents and citizens of the United States, where the Chinese heirs—decedent's mother and the mother of her predeceased spouse — were living on the mainland of China at or near Canton, which had been overrun and occupied by the Chinese communists. If such reciprocity existed, as was found by the trial court, the above two persons are the sole statutory heirs entitled to succeed to the estate and the public administrator has prior rights to letters of administration over the respondent Ng, who would take no portion of the estate.

At the trial of the two opposing petitions, the Public Administrator referred the court to the treaty of 1946 between the United States and the Republic of China establishing reciprocal rights of inheritance as to real and personal property between citizens

and residents of the respective signatory nations (Certified Record, Page 38 of Reporter's Transcript.) The trial court took judicial notice of this treaty. The Public Administrator also introduced evidence in the form of a statement from the United States Department of State that the treaty of 1946 was in full force and effect between its respective signatories at the date of the decedent's death and thereafter. (Certified Record, Page 38 of Reporter's Transcript.) The trial court further took notice of the fact that the Communist regime is not recognized by the United States goverment and our government does recognize a continuing state of civil war between said Communist regime and the Republic of China. (Certified Record, Reporter's Transcript, p. 45.) The Respondent introduced no evidence to refute or contradict that of the Public Administrator, but did give evidence that both his mother and the decedent's mother were citizens of the Republic of China in 1922 and thereafter. (Certified Record, Reporter's Transcript, pp 18, 22.) Respondent gave no evidence that either of them had ever renounced their Republic of China citizenship or allegiance or were other in status than citizens or nationals of the Republic of China in territory that had been overrun and occupied by the Communist regime.

Upon the above record the trial court found that both the decedent's mother and the mother of her predeceased spouse were citizens and residents of

the Republic of China; that the treaty between the Republic of China and the United States of America granted reciprocal rights of inheritance and succession as to personal and real property located in the respective countries and that on the date of the decedent's death, December 5, 1962, there existed reciprocal rights of inheritance between citizens of the Republic of China and citizens of the United States of America. (Cerified Record, Reporter's Transcript, pp. 44-45.)

It is submitted that the California District Court of Appeal has erroneously decided the point of law as to whether or not under the circumstances of this case the foreign heirs are afforded the benefit of rights of inheritance secured to citizens and residents of the Republic of China by existing treaty between the Republic of China and the United States of America and further that its decision is in conflict with decisions of this Court in *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 431, 91 L. Ed. 1633, and *Kolovrat v. Oregon,* 366 U.S. 187, 6 L. Ed. 2d 218.

Further, said District Court of Appeal opinion is also in direct conflict with the *Estate of Nepogodin,* 134 Cal. App. 2d 161, a prior California District Court of Appeal opinion involving the same treaty and the same nations, which held the treaty is applicable to establish reciprocal rights of inheritance despite the communist control.

A. Presentation of Federal Question in the State Court.

Superior Court of the State of California. In the trial court it was submitted by the Public Administrator that there were reciprocal rights of inheritance with the Republic of China because of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China. (Certified Records, Reporter's Transcript, p. 36.) The Public Administrator also introduced a letter from the United States Department of State dated January 15, 1963, stating the aforesaid treaty is still in full force and effect. (Certified Record, Reporter's Transcript, p. 38.) The trial court judge took judicial notice of the treaty and, therefore, found reciprocal rights of inheritance between the United States and the Republic of China and on that basis ordered letters of administration to issue to the Public Administrator.

District Court of Appeal. Respondent Ng appealed the trial court decision to the District Court of Appeal questioning whether the Treaty of Friendship, Commerce and Navigation was applicable to the mainland of China to establish reciprocal rights of inheritance. (Certified Record, Appellant's Brief on Appeal, p. 5.)

The Public Administrator in his reply brief to the District Court of Appeal said the treaty was applicable as the supreme law of the land under Article VI, Clause 2 of the United States Constitution. (Certified Record, Respondent's Brief, pp. 5-8.)

The District Court of Appeal in its opinion took judicial notice of certain official public acts of the United States Department of State and determined from these acts the treaty to be inapplicable. (Certified Record, Opinion of District Court of Appeal, p. 6.) The official acts of the United States Department of State judicially noticed were as follows:

1. Occasional dealings by our government with representatives of the People's Republic. (Certified Record, Opinion of District Court of Appeal, pp. 6-7.)

2. Refusal of United States to issue passports for travel in communist held territory. (Certified Record, Opinion of District Court of Appeal, pp. 8-9.)

3. Policy of United States forbidding trading with communist China under the Foreign Assets Control Regulation. (Certified Record, Opinion of District Court of Appeal, p. 9.)

Supreme Court of California. The Public Administrator petitioned the California Supreme Court for a hearing contending that the 1946 treaty between the United States and the Republic of China was applicable to establish reciprocal rights of inheritance to citizens and residents of mainland China despite the official public acts judicially noticed by the District Court of Appeal. (Certfied Record, Petition for hearing in the Supreme Court, pp. 2-7.) The California Supreme Court denied the Public Administrator's petition on August 20, 1964. (Certified Record, Order Denying Hearing.)

REASONS FOR GRANTING THE WRIT

In 1946, this nation entered into the Treaty of Friendship, Commerce and Navigation with the Republic of China. Among the numerous matters comprehended in that treaty was the official recognition by the two respective governments of the reciprocal rights of the citizens of each government to inherit in accord with law from the estates of the citizens of the other. This treaty and this provision was the will of the executive branch of the federal government and it remains alive to this day. Our government recognizes to this day the Republic of China as the legal government not only of the Island of Formosa, but of the mainland of China. Our government necessarily, whatever may be the political ability of the Republic of China to enforce and advance the rights of Chinese living on the mainland, views these Chinese as citizens of the Republic of China and unless and until by proper action of the executive sphere the Treaty of Friendship, Commerce and Navigation is disavowed in whole or in particular, the treaty must be applied by our courts.

The decision of the California District Court of Appeal impinged on the proper function of the executive. By judicial fiat it purports to write governmental decisions out of existence and write in a local judicial tribunal's views of political matters. This we submit is the far reaching import of that

court's assertion that it will not uphold the rights stemming from the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China.

I.

TREATY IS THE SUPREME LAW OF THE LAND AND SUPERSEDES CONFLICTING PROVISIONS OF STATE LAW.

It is, of course, fundamental that treaties of the United States are the supreme law of the land. Article VI, Clause 2, of the United States Constitution.

The treaty in the case at bar under the provisions of Section 2 and 4 of Article VIII (63 Stats. at large, pt. 2, p. 1300) gives to the national of either nation inheritance rights to real and personal property left to them within the other nation's territory regardless of the nationality of the decent. The Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China is still in full force and effect. "United States Treaties In Force," 1963 publication of United States State Department. This treaty supersedes California's Probate Code Section 259. This court said in *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 at Page 1645 of 91 L. Ed. that,

> "Rights of succession of property are determined by local law. (Citations.) Those rights may be affected by an overriding federal policy, as where

a treaty gives different or conflicting arrangements. (Citations.) Then the state policy must give way."

II.

ABROGATION OF A TREATY IS A POLITICAL QUESTION.

The California District Court of Appeal in holding the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China inapplicable as to reciprocal rights of inheritance between the respective signatory nations, has decided a question which has traditionally been held by this court to be a political question which is to be determined by our national government. *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 431, 91 L. Ed. 1633.

Our national government has not decreed that this treaty is terminated or inapplicable or that it does not apply to all territory — continental and insular of the Republic of China. To the contrary, the official position of our national government is that the treaty is in full force and effect. "United States Treaties In Force," United States Departmentment of State publication for the year 1963.

The California District Court of Appeal in deciding the *Estate of Nepogodin,* 134 Cal. App. 2d 161, which involved the same treaty as in the case at bar, said at Page 170,

"As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political departments of our government is controlling. (*Clark v. Allen,* 331 U.S. 503, 514 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R., 953]; *Terlinden v. Ames,* 184 U.S. 270 285, 288 [22 S. Ct. 484, 46 L. Ed. 534].) In *Clark v. Allen* it was held that the fact that Germany after its defeat in the Second World War was under Allied occupation could not be considered by the court to have terminated a treaty between that country and the United States concerning the right to succession to real property when there was no evidence that the political departments had so considered it. The same must apply *a fortiori* to the civil war in China . . ."

III.

CALIFORNIA DISTRICT COURT OF APPEAL DECISION IS IN CONFLICT WITH UNITED STATES SUPREME COURT DECISIONS.

This court held in the case of *Clark v. Allen,* 311 U.S. 503, 67 S. Ct. 1431, 91 L. Ed 1633, which involved reciprocal rights of inheritance between Germany and the United States, that the fact that Germany after its defeat in the Second World War was under allied occupation could not be considered by the court to have terminated a treaty between that country and the United States where there was no evidence that the political departments of the United States had so considered it.

Further, this court in *Clark v. Allen, supra,* held that the Trading with the Enemy Act adopted by Congress during World War II, would not effect the inheritance rights granted resident aliens under the treaty existing at that time with Germany. This court continued to recognize in the *Allen Case, supra,* that the outbreak of war between contracting parties to a treaty does not necessarily make inapplicable or abrogate said treaty.

Also in a more recent case involving communist Yugoslavia, this court held in *Kolovrat v. Oregon,* 336 U.S. 187, 6 L. Ed. 2d 218, that the fact that the Yugoslavia government controlled the exchange of money between Yugoslavia and the United States

would not in any way abrogate or make the treaty inapplicable between the United States and Yugoslavia.

The very actions which this court has held do not abrogate or suspend a treaty have been construed by the California District Court of Appeal to make a treaty inapplicable despite its statement that, "The United States does not extend diplomatic recognition to the People's Republic but continues to regard the Republic of China, presently residing on the Island of Formosa, as the government of China." (Certified Records, Opinion of California District Court of Appeal, pp. 6-7.)

CONCLUSION

This petition should be granted because the California District Court of Appeal opinion has held a federal treaty inapplicable, which is inconsistent with the decisions of this court and in conflict with the Supremacy Clause of the United States Constitution. If this decision is allowed to stand, the privileges of millions of Americans and foreign aliens established under treaties are in jeopardy by lower courts establishing what they think our national policy is, or should be.

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